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SUWIRI SDN BHD

v.

GOVERNMENT OF THE STATE OF SABAH

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FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
HASHIM YUSOFF FCJ
AZMEL MAAMOR FCJ
[CIVIL APPEAL NO: 01-9-2006 (S)]

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21 AUGUST 2007

TRADE AND INDUSTRY: *Forestry - Licence to take timber - Breach of contract - Authorization to approve granting of rights over forest reserve of state land - Requirements to be satisfied - Whether binding contract to*

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extend timber licence in existence - Privity - Quantum of damages - Government Contracts Act 1949, s. 3

CONTRACT: *Agreement to extract timber - Breach - Authorization to approve granting of rights over forest reserve of state land - Requirements*

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to be satisfied - Whether binding contract to extend timber licence in existence - Privity - Quantum of damages - Government Contracts Act 1949, s. 3

The appellant was granted a licence to fell and extract timber in a forest reserve in the State of Sabah comprising an area of

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5,665.59 hectares. The licence was valid for a period of five years from 13 March 1993 to 13 March 1998. The appellant, unable to extract the timber in the area within the period stated in the licence, applied to the Setiausaha Hasil Bumi ('SHB') for an extension of time. The SHB, in his letter dated 25 November

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1997 to the Director of Forestry, stated that he agreed to have the licence renewed for the whole of the concession area for a period until 31 December 1999, subject to a survey being carried out by the Director of Forestry and the provisions of the Sabah Forest Enactment 1968 ('Enactment'). Contrary to what had been

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indicated by the SHB, the respondent, instead of renewing the extension, decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares, with the remaining area of 3,461.18 hectares being distributed to three other companies under separate licences. The appellant, being dissatisfied, initiated

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a proceeding in the High Court against the respondent, claiming damages for breach of contract and other declaratory reliefs. The

High Court allowed the appellant's claim and awarded damages in the sum of RM21,890,133.75. On appeal by the respondent, the Court of Appeal, by a majority decision, reversed the High Court's decision and dismissed the appellant's claim. Hence, the present appeal by the appellant, in which the following questions required determination: (i) whether the SHB, for and on behalf of the Sabah State Government, has the authority to approve the granting of any rights in or over a forest reserve or state land in Sabah; (ii) whether a letter of approval signed by the SHB and communicated to the appellant created a binding contract to renew or extend the timber licence; and (iii) whether it is open to the Court of Appeal to reopen the finding of the trial judge on quantum of damages when the figure and evidence presented were not even disputed or challenged by the respondent at the court of first instance and even at the Court of Appeal.

Held (dismissing the appeal)
Per Azmel Maamor FCJ delivering the judgment of the court:

(1) The entry of the contract for the timber licence by the Minister with the appellant under s. 15 of the Enactment conformed with the requirements of s. 3 of the Government Contracts Act 1949 ('Act'). The focal issue needing consideration was under what circumstances could a public officer be legally authorized to enter into such a contract for timber licence with the appellant. It could only be done if the requirements of s. 3 of the Act were satisfied. In other words, the public officer must obtain the authorization of the Minister in writing to act on behalf of the State Government. To apply those requirements as stipulated by s. 3 of the Act to the instant case, the SHB, a public officer, must show that he had the written authorization of the Minister before he could act on behalf of the respondent on any dealing over the said Forest Reserve. Without the necessary written authorization of the Minister, the SHB's action would be void and invalid. There was no evidence adduced by the appellant to show that the SHB had been granted with such written authorization to act on behalf of the Sabah State Government. Therefore, it simply meant that the SHB had not been delegated with the authority to act for the respondent. In the circumstances, the answer to the 1st question would be in the negative. (para 9)

(2) Firstly, the alleged approval letter was in fact an internal communication between the SHB and the Director of Forestry. It was not even copied to the appellant. Such being the position, the appellant was regarded as a stranger to such communication. In other words, the appellant was not a party to the alleged letter of approval. Based on the doctrine of privity of contract, the appellant would have no locus or right to enforce the contents of the alleged letter of approval in favour of the appellant. Also, the respondent could not be under an obligation to be bound by the terms of the alleged approval letter because the SHB had no legal capacity to act on behalf of the respondent. It was not in dispute that when he wrote the impugned letter to the Director of Forestry, the SHB signed it in his capacity as the SHB and not for and on behalf of the Minister. Secondly, the approval given by the SHB was not unconditional. It contained two conditions. The more crucial condition was that such approval was to be "tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968". The glaringly relevant provision of the Enactment is that it requires the Minister to issue the approval letter. There is no provision in the Enactment empowering the SHB to issue such approval letter, nor was there any written authorization of the Minister allowing the SHB to issue such approval letter. For the abovementioned reasons, the letter of approval signed by the SHB, without the necessary written authorization of the Minister, had not created any rights whatsoever to the appellant nor any obligations on the respondent. In the circumstances, the answer to the 2nd question was also in the negative. (paras 12, 17, 18 & 19)

(3) The natural effect of the negative answers to the 1st and 2nd questions was that the respondent could not be liable to the appellant based on the letter of approval issued by the SHB. It followed, thus, that payment of damages did not arise, rendering it unnecessary for this court to answer the 3rd question since it would be an act of futility. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah diberi lesen untuk menebang dan mengeluarkan kayu kayan dari satu kawasan hutan simpan di Negeri Sabah seluas lebih kurang 5,665.59 hektar. Lesen adalah sah bagi tempoh lima tahun bermula 13 Mac 1993 hingga 13 Mac 1998. Perayu gagal mengeluarkan kayu kayan dari kawasan tersebut dalam tempoh

yang ditetapkan di dalam lesen, dan berikutnya memohon kepada Setiausaha Hasil Bumi ('SHB') untuk satu lanjutan masa. Dalam suratnya bertarikh 25 November 1997 kepada Pengarah Perhutanan, SHB menyatakan bahawa beliau bersetuju supaya lesen diperbaharui bagi keseluruhan kawasan konsesi untuk tempoh sehingga 31 Disember 1999, tertakluk kepada pemetaan dibuat oleh Pengarah Perhutanan dan peruntukan-peruntukan Enakmen Hutan Sabah 1968 ('Enakmen'). Bertentangan dengan apa yang katakan oleh SHB, responden tidak memperbaharui lanjutan masa, tetapi memutus untuk mengeluarkan satu lesen baru kepada perayu bagi kawasan seluas hanya 2,204.41 hektar, sambil mengagih-agihkan baki 3,461.18 hektar kepada tiga syarikat lain di bawah lesen-lesen yang berasingan. Tidak berpuas hati, perayu memulakan prosiding di Mahkamah Tinggi terhadap responden, menuntut gantirugi kerana kemungkiran kontrak dan relif-relif deklaratori lain. Mahkamah Tinggi membenarkan tuntutan perayu dan mengawardkan gantirugi sebanyak RM21,890,133.75. Responden merayu dan Mahkamah Rayuan, melalui satu keputusan majoriti, telah mengakas keputusan Mahkamah Tinggi dan menolak tuntutan perayu. Perayu merayu ke mahkamah semasa dan membangkitkan persoalan-persoalan berikut untuk pemutusan, iaitu: (i) sama ada SHB mempunyai kuasa untuk meluluskan bagi pihak Kerajaan Negeri Sabah apa-apa pemberian hak ke atas mana-mana kawasan hutan simpan atau tanah kerajaan di Negeri Sabah; (ii) sama ada surat kelulusan yang ditandatangani oleh SHB dan diserahkan kepada perayu membentuk satu kontrak mengikat untuk membaharui atau melanjutkan lesen pembalakan; dan (iii) sama ada Mahkamah Rayuan boleh meneliti semula dapatan hakim bicara berhubung kuantum gantirugi walaupun jumlah dan keterangan yang dikemukakan langsung tidak dipertikai atau dicabar oleh responden di pendengaran di mahkamah pertama mahupun di Mahkamah Rayuan.

Diputuskan (menolak rayuan)

Oleh Azmel Maamor HMP menyampaikan penghakiman mahkamah:

(1) Pemeteraian kontrak lesen pembalakan oleh Menteri dengan perayu di bawah s. 15 Enakmen mematuhi kehendak-kehendak s. 3 Akta Kontrak Kerajaan 1949 ('Akta'). Isu utama yang perlu dipertimbang adalah dalam keadaan apakah seorang penjawat awam boleh di sisi undang-undang dibenarkan untuk memeterai kontrak lesen pembalakan dengan perayu. Ia hanya boleh dibuat jika kehendak-kehendak s. 3 Akta dipatuhi.

Dengan kata lain, seorang penjawat awam hendaklah mendapat kebenaran bertulis dari Menteri untuk bertindak bagi pihak Kerajaan Negeri. Melaksanakan kehendak-kehendak s. 3 Akta kepada kes semasa, SHB, selaku seorang penjawat awam, mestilah menunjukkan bahawa beliau mempunyai kebenaran bertulis dari Menteri sebelum beliau boleh bertindak bagi pihak responden atas mana-mana urusan berkaitan Hutan Simpan berkenaan. Tanpa kebenaran bertulis Menteri tersebut, tindakan SHB akan menjadi batal dan tak sah. Tiada keterangan dikemukakan oleh perayu untuk menunjukkan bahawa SHB telah diberi kebenaran yang dikatakan untuk bertindak bagi pihak Kerajaan Negeri Sabah. Jelas bahawa SHB tidak diberi kebenaran untuk bertindak bagi pihak responden. Oleh itu, jawapan kepada soalan pertama adalah berbentuk negatif.

(2) Pertama sekali, surat kelulusan yang dikatakan itu sebenarnya adalah suatu komunikasi dalaman di antara SHB dan Pengarah Perhutanan. Ia malah tidak disalinkan kepada perayu. Dalam keadaan sedemikian, perayu dianggap sebagai pihak luar kepada komunikasi tersebut. Dengan kata lain, perayu bukanlah pihak kepada surat kelulusan tersebut. Maka itu, berdasarkan doktrin priviti kontrak, perayu tiada locus atau hak untuk menguatkuasakan kandungan surat kelulusan yang dikatakan itu bagi manfaatnya. Responden juga tidak berada di bawah apa-apa obligasi untuk terikat kepada surat kelulusan kerana SHB tidak mempunyai kapasiti undang-undang untuk bertindak bagi pihak responden. Tidak dinafikan bahawa apabila beliau menulis surat yang dicabar itu kepada Pengarah Perhutanan, SHB menandatanganinya dalam kapasitinya sebagai SHB dan bukannya untuk dan bagi pihak Menteri. Keduanya, kelulusan yang diberikan oleh SHB bukanlah kelulusan tidak bersyarat. Ia mengandungi dua syarat. Syarat yang lebih penting adalah bahawa kelulusan adalah "tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968". Peruntukan Enakmen jelas relevan kerana ia mengkehendaki Menteri mengeluarkan surat kelulusan. Jelas bahawa tidak ada peruntukan di dalam Enakmen yang memberi kuasa kepada SHB untuk mengeluarkan surat kelulusan dan tidak ada sebarang kebenaran bertulis diberi oleh Menteri membenarkan SHB mengeluarkan surat kelulusan. Atas alasan-alasan ini, maka surat kelulusan yang ditandatangani SHB, dan yang ditandatangani oleh beliau

tanpa apa-apa kebenaran bertulis untuknya diberi oleh Menteri, tidak memberi apa-apa hak kepada perayu mahupun apa-apa obligasi ke atas responden. Oleh itu, jawapan kepada soalan kedua adalah juga berbentuk negatif.

(3) Akibat dari jawapan-jawapan negatif terhadap soalan-soalan pertama dan kedua di atas adalah bahawa responden tidak bertanggungan kepada perayu berdasarkan kepada surat kelulusan yang dikeluarkan oleh SHB. Ianya dengan itu mengikut bahawa bayaran gantirugi adalah tidak berbangkit, sekaligus menjadikannya tidak perlu bagi mahkamah ini menjawab soalan ketiga kerana ia hanyalah perbuatan sia-sia.

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***
Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(refd)***
Schmidt v. Kepong Prospecting Ltd & Ors [1964] 1 LNS 183 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Government Contracts Act 1949, s. 3
Malay Reservations Enactment, s. 13
Sabah Forest Enactment 1968, s. 15

For the appellant - Marina Tiu; M/s Yap Chin & Tiu
For the respondent - Juprin Wong-Adamal SSC; AG's Chambers Sabah

[Appeal from Court of Appeal, Civil Appeal No: S-01-111-2004]

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor FCJ:

[1] The Federal Court granted leave to the appellant to appeal to the Federal Court based on the following questions namely:

1. Whether the Setiausaha Hasil Bumi for and on behalf of the Sabah State Government has the authority to approve the granting of any rights in or over a forest reserve or state land in Sabah;

2. Whether a letter of approval signed by the Setiausaha Hasil Bumi and communicated to the Appellant created a binding contract to renew or extend the timber licence; and

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3. Whether it is open to the Court of Appeal to reopen the finding of the trial Judge on quantum of damages when the figure and evidence presented were not even disputed or challenged by the Respondent at the Court of first instance and even at the Court of Appeal.

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[2] The appellant (the plaintiff in the court of first instance) was granted a licence to fell and extract timber in a forest reserve in Keningau in the State of Sabah comprising an area of 5,665.59 hectares. The said licence was valid for a period of five years from 13 March 1993 to 13 March 1998. Because the appellant was

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unable to extract the timber in the said area within the period stated in the licence an application for extension of time was made to the Setiausaha Hasil Bumi, Datuk William Shim. The reason given for not being able to complete the extraction was due to rainy weather and poor road condition.

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[3] The Setiausaha Hasil Bumi, in his letter dated 25 November 1997 to the Director of Forestry, stated that he agreed to have the said licence renewed for the whole of the concession area of 5,665.59 hectares for a period until 31 December 1999 but

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subject to a survey being carried out by the Director of Forestry and also to the provision of the Sabah Forest Enactment 1968.

[4] Contrary to what had been indicated by the Setiausaha Hasil Bumi, the respondent instead of renewing the extension,

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decided to issue a new licence to the appellant reducing the concession area to 2,204.41 hectares. The remaining area of 3,461.18 hectares was distributed to three other companies under separate licences. Being dissatisfied with the decision of the respondent the appellant initiated a proceeding in the High Court

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at Kota Kinabalu against the respondent claiming damages for breach of contract and other declaratory reliefs.

[5] At the High Court, the learned trial judge allowed the appellant's claim with costs and awarded damages in the sum of RM21,890,133.75 with interest thereon at the rate of 8% per

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annum from the date of judgment until full settlement.

[6] On an appeal by the respondent, the Court of Appeal by a majority decision reversed the decision of the High Court and ordered that the appellant's claims be dismissed with costs. Hence

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the appeal to this court.

The 1st Question

[7] In a contract where a State Government is involved as a party the provision of s. 3 of the Government Contracts Act 1949 (the 1949 Act) is applicable. The application of the 1949 Act had been extended to Sabah and Sarawak on 16 September 1963. Section 3 of the 1949 Act reads:

> **3. Contract On Behalf Of A State Government**
>
> (1) All contracts made in Malaysia on behalf of a State Government shall, if reduced in writing, be made in the name of the State Government of the State, **or by any public officer duly authorized in writing by the Chief Minister,** either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorization.
>
> (2) In the application of this section to Sabah and Sarawak "Chief Minister" includes any State Minister. (emphasis added).

[8] The timber licence in Sabah is issued under s. 15 of the Sabah Forest Enactment 1968 (the Enactment). It states:

> (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the approval of the Cabinet or of a licence.
>
> (1A) A licence agreement entered into by the Minister under sub-section (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.
>
> (2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such licence agreement shall be deemed to be compliance with the provisions of this Enactment:

A Provided that no licence shall be issued or no licence agreement shall be entered into under this Enactment in respect of Forest Reserves of Class 1, Class VI and Class VII.

B **[9]** Hence the entry of the contract for the timber licence by the Minister with the appellant under s. 15 of the Enactment was in conformity with the requirements of s. 3 of the 1949 Act. The focal issue that needs consideration now is under what circumstances can a public officer be legally authorized to enter into such a contract for timber licence with the appellant. In our C view it can only be done if the requirements of s. 3 of the 1949 Act are satisfied. In other words, the public officer must obtain the authorization of the Minister in writing to act on behalf of the State Government. To apply those requirements as stipulated by s. 3 of the 1949 Act to the instant case, the Setiausaha Hasil D Bumi, a public officer, must show that he has the written authorization of the Minister before he could act on behalf of the respondent on any dealing over the said Forest Reserve. Without the necessary written authorization of the Minister then his action would be void and invalid. There was nothing before us nor at the E courts below of any evidence adduced by the appellant to show that the Setiausaha Hasil Bumi had been granted with such written authorization to act on behalf of the Sabah State Government. Therefore, it simply means that the Setiausaha Hasil Bumi had not been delegated with the authority to act for the F respondent. In the circumstances our answer to the 1st question would be in the negative.

The 2nd Question

G **[10]** The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, ie, persons who are not parties to it.

[11] The letter of approval relied upon by the appellant was actually a letter written by the Setiausaha Hasil Bumi to the H Director of Forestry indicating his approval to renew the appellant's timber licence. The letter, dated 25 November 1997 (exh. P5) was in fact an internal communication between the Setiausaha Hasil Bumi to the Director of Forestry, not copied to the appellant, but some how or other the appellant had managed I to obtain a copy. The content of the letter states:

2. Syarikat Suwiri Sdn. Bhd. memohon supaya Lesen Hutan no. JP(NNN) 042/93(SP) seluas 5,665.59 hektar di Sg. Talangkai diperbaharui.

3. Permohonan ini telah pun dirujuk kepada tuan dan permohonan disyorkan diperbaharui bagi kawasan seluas 2,204.41 hektar sahaja melalui surat Bil:JP(P&P)00/02/01/3/142/26 bertarikh 29 Ogos 1997.

4. Setelah permohonan ini dikaji dan keatas penjelasan seperti surat Bil. SWR/KPPW/97/11/1-001 bertarikh 13 November 1997 yang dialamatkan kepada Ketua Pegawai Perhutanan Wilayah Keningau dan latar belakang aktiviti pembalakan yang dijalankan dalam kup 1993 (JP(NNN)042/93(SP) dan kup 1994 (JP(NNN)042/92(SP) permohonan syarikat untuk membaharui keseluruhan kawasan seluas 5,665.59 hektar adalah dipersetujui tertakluk kepada kajian lapang oleh pihak tuan **dan tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968.** Lesen hutan yang akan dikeluarkan adalah bagi tempoh sehingga 31.12.1999. (emphasis added).

[12] Firstly, the alleged approval letter was in fact an internal communication between the Setiausaha Hasil Bumi and the Director of Forestry. It was not even copied to the appellant. Such being the position the appellant is regarded as a stranger to such communication. In other words the appellant was not a party to the alleged letter of approval. Based on the doctrine of the privity of contract, the appellant would have no locus or right to enforce the content of the alleged letter of approval in favour of the appellant.

[13] The principle in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd* [1915] AC 847 is a clear example on the rule of privity of contract. The House of Lords in this case stated:

> ... In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.
>
> Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.

[14] In *Schmidt v. Kepong Prospecting Ltd & Ors* [1964] 1 LNS 183 the Federal Court recognized the application of the doctrine of privity of contract in Malaysia that a person who is not a party to a contract cannot take advantage of provisions of the contract.

In this case, the appellant assisted one Tan to obtain a prospecting permit where Tan promised to pay the appellant a tribute of 1% of the selling price of iron sold. Subsequently an agreement in 1954 was made between a company and Tan under which the company took over Tan's obligation to pay the 1% tribute. The appellant was not a party to this agreement. In 1955 an agreement was made between the company and the appellant where the company agreed to pay the appellant the 1% tribute. The appellant claimed for the tribute but the company argued that the 1954 agreement was not enforceable as the appellant was not a party to it. The Federal Court agreed with the company where the 1954 agreement could be enforced only by the company or Tan; who were the only parties to the contract.

[15] In another case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 the appellants were the registered co-owners of a piece of Malay reserve land in Tampin. The appellants in assisting their business associate, one Ismail Omar, charged their land to the respondent (bank) to furnish security for Ismail Omar's personal loan. After the loan was disbursed, Ismail Omar breached the loan agreement and the respondent foreclosed the third party security and obtained an order for sale of the property. The appellants successfully applied and had the order of sale declared null and void on the ground that they were in violation of the prohibition imposed by s. 13 of the Malay Reservations Enactment. The respondent then filed an application before the same judge for a declaration that the appellants, having received a benefit from the respondent pursuant to s. 66 of the Contracts Act 1950 (the Act) were liable to repay the outstanding amount owing to the respondent. Section 66 of the Act states:

> 66. **Obligation Of Person Who Has Received Advantage Under Void Agreement, Or Contract That Becomes Void**
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[16] One of the issues raised was whether s. 66 of the Act could be invoked against the appellants. The Federal Court held that s. 66 of the Act could not be invoked against the appellants because they were not the recipients of the loan and they were not parties to the loan agreement with the respondent.

[17] On the basis of the principle as stated above, the respondent could not be under an obligation to be bound by the terms of the alleged approval letter because the Setiausaha Hasil Bumi had no legal capacity to act on behalf of the respondent. It is not in dispute that when he wrote the impugned letter to the Director of Forestry the Setiausaha Hasil Bumi signed it in his capacity as the Setiausaha Hasil Bumi and not acting for and on behalf of the Minister. As we have discussed earlier, the Setiausaha Hasil Bumi can only act lawfully if he obtains the necessary written authorization from the Minister. He had no such written authorization.

[18] Secondly, the approval given by the Setiausaha Hasil Bumi was not unconditional. It contained two conditions. The more crucial condition is that such approval was to be "tertakluk kepada peruntukan-peruntukan Enakmen Hutan 1968." The glaringly relevant provision of the 1968 Enactment is that it requires the Minister to issue the approval letter. There is no provision in the 1968 Enactment which empowers the Setiausaha Hasil Bumi to issue such approved letter, nor was there any written authorization of the Minister allowing the Setiausaha Hasil Bumi to issue such approval letter.

[19] For the reasons as mentioned above we arrived at the finding that the letter of approval signed by the Setiausaha Hasil Bumi, who, without the necessary written authorization of the Minister, had not created any rights whatsoever to the appellant nor any obligations on the respondent. In the circumstances our answer to the second question is also in the negative.

The 3rd Question

[20] The natural effect of our negative answers to the 1st and 2nd questions is that the respondent could not be liable to the appellant based on the letter of approval issued by the Setiausaha Hasil Bumi. It follows therefore payment of damages does not arise. Hence it is not necessary for us to answer the 3rd question because to do so would be an act of futility which this court must refrain from doing so.